

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED

FEB 27 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Amendment of the Commission's)
Regulatory Policies to Allow)
Non-U.S.-Licensed Space Stations)
To Provide Domestic and International)
Satellite Service in the United States)

IB Docket No. 96-111

and)

Amendment of Section 25.131 of the)
Commission's Rules and Regulations to)
Eliminate the Licensing Requirement for)
Certain International Receive-Only Earth)
Stations)

CC Docket No. 93-23
RM-7931

and)

COMMUNICATIONS SATELLITE)
CORPORATION)
Request for Waiver of Section 25.131(j)(1))
Of the Commission's Rules As It applies to)
Services Provided via the INTELSAT K)
Satellite)

File No. ISP-92-007

**REPLY IN SUPPORT OF PETITION FOR
CLARIFICATION AND RECONSIDERATION**

ICO Global Communications ("ICO"), pursuant to 47 U.S.C. §405 and 47 C.F.R.
§1.429, hereby submits this reply in support of the Petition for Clarification and
Reconsideration of ICO Global Communications filed in this proceeding on January 5,
1998 ("ICO Petition").

I. ICO'S PROPOSAL TO ELIMINATE REDUNDANT LICENSING REQUIREMENTS IS FULLY CONSISTENT WITH WTO PRINCIPLES AND THE COMMISSION'S SPECTRUM MANAGEMENT RESPONSIBILITIES

ICO has asked the Commission to reconsider its decision to impose the same legal, technical and financial reporting requirements on non-U.S. licensed satellite operators that the Commission imposes on U.S. operators seeking licenses from the Commission.¹ As ICO's petition points out, this requirement is needlessly burdensome and raises a risk that foreign administrations will impose counterpart burdens on U.S. licensees seeking to serve other countries.² ICO has urged the Commission either to abandon these redundant licensing requirements altogether or replace those requirements with a presumption that foreign licensing standards and procedures are sufficient.³ Where an opponent of an application offers highly probative evidence that rebuts the presumption of sufficiency, the Commission can impose such requirements as are reasonably necessary to protect the spectrum management process.

The opposition filings attack ICO's proposal on several grounds. Loral and Motorola argue that all of the information the FCC requires from non-U.S. licensed applicants is needed for effective spectrum management.⁴ Boeing and Motorola contend that ICO's proposal will make the application process substantially more burdensome for

¹ The Commission is of course justified in requiring certain technical information from non-U.S. licensed satellite operators for both international and domestic coordination purposes.

² ICO Petition at 4.

³ *Id.* at 3-4 & n.5.

⁴ Joint Opposition to Petition for Reconsideration of Loral Space & Communications Ltd. and Globalstar, L.P. at 6-7 (Feb. 17, 1998) ("Loral Opposition"); Comments of Motorola, Inc. and Iridium Operating LLC to Petition for Clarification and Reconsideration of ICO Global Communications at 3 (Feb. 17, 1998) ("Motorola Opposition").

the Commission.⁵ Boeing suggests that if the Commission does not enforce redundant informational requirements on non-U.S. licensed applicants, U.S. satellite operators will seek to license their systems with less demanding foreign administrations.⁶ Finally, Boeing argues that the ICO proposal violates National Treatment and Most Favored Nation principles that the United States is obliged to respect.⁷ None of these arguments supports the imposition on non-U.S. licensed operators of informational requirements that replicate the rules of foreign licensing administrations.

ICO especially disagrees with the claim of Loral and Motorola that the Commission's ability to manage spectrum efficiently will be impaired unless non-U.S. licensees are made to comply with redundant informational requirements. Foreign licensing administrations, no less than the FCC, have the authority and incentive to ensure that satellite operators who propose to use scarce radiofrequency spectrum will do so in ways that are "compatible with ongoing and future operations in [the same] frequency band."⁸ Foreign administrations also have the authority and incentive to assure themselves of the financial and legal qualifications of their satellite operators, licensed or authorized in their jurisdictions, to build and operate their systems in accordance with applicable regulations. A rule that presumes the inadequacy of foreign licensing standards is not needed to achieve these goals, and merely invites foreign administrations to treat with similar skepticism the licensing standards of the United States.

⁵ Opposition of The Boeing Company at 6 (Feb. 17, 1998) ("Boeing Opposition"); Motorola Opposition at 3.

⁶ Boeing Opposition at 5.

⁷ *Id.*

⁸ *Amendment of the Commission's Regulatory Policies to Allow Non-U.S. Licensed Space Stations to Provide Domestic and International Satellite Service in the United*

ICO also does not agree, as Boeing and Motorola contend, that ICO's proposed rebuttable presumption of the adequacy of foreign licensing standards will cause delay and impose a "tremendous administrative burden for the Commission's staff, by forcing the International Bureau to develop and maintain detailed records on the licensing rules for every WTO Member country that authorizes satellites."⁹ ICO's proposal would require the Commission to consider the adequacy of foreign licensing rules only where an opposition to an application challenges the sufficiency of those rules, and would place upon the proponents and opponents of an application, rather than the Commission, the burden of assembling relevant information concerning foreign licensing regimes. This approach should be no more burdensome to the Commission staff, and substantially less burdensome to applicants, than a process that requires applicants to prepare -- and the Commission to review -- the qualifications of every non-U.S. licensed satellite operator that applies for authority to serve the United States.¹⁰

Finally, there is no merit to Boeing's claim that ICO's proposal somehow violates the National Treatment ("NT") and Most Favored Nation ("MFN") principles of the WTO. Boeing incorrectly contends that National Treatment requires the Commission to impose the same market entry procedures on foreign carriers that it imposes on domestic carriers, and that application of the U.S. licensing rules only to operators from countries whose licensing regimes are proved to be deficient violates Most Favored Nation

States, IB Docket No. 96-111, Report and Order, FCC No. 97-399, at ¶ 155 (Nov. 26, 1997) ("Report and Order").

⁹ Boeing Opposition at 6. Motorola similarly argues that ICO's proposal would "delay licensing proceedings by requiring the Commission to examine the sufficiency of foreign licensing practices." Motorola Opposition at 3.

¹⁰ Contrary to Boeing's claim, ICO's proposal will not encourage U.S. satellite operators to seek licenses from more lenient foreign administrations. If a carrier attempts

treatment. As the Commission has made clear, "treatment of domestic and foreign service suppliers need not be identical to accord MFN or national treatment."¹¹ MFN and NT require only that national regulations be competitively neutral, so that "dissimilar treatment [will] not put the foreign supplier at a competitive disadvantage to another foreign supplier or a domestic supplier."¹² ICO's proposal complies with this standard. ICO proposes that U.S. licensed and non-U.S. licensed satellite operators both should comply with reporting requirements satisfactory to the Commission before obtaining authority to serve the United States, *and should be required to do so only once*. ICO's proposal will place no satellite operator -- foreign or domestic -- at a competitive disadvantage as compared to any other operator, and therefore does not implicate MFN and NT principles at all.

II. ICO SHOULD NOT BE CLASSIFIED AS AN IGO AFFILIATE

The opposition filings make two claims in support of the Commission's classification of ICO as an IGO affiliate: first, that the record does not support a decision as to ICO's proper classification, which therefore should be deferred to another proceeding;¹³ and second, that "affiliation" for this purpose should be defined in terms of ownership interests without regard to the ability or inability of investors in ICO to leverage their investments into competitive advantages for ICO.¹⁴

such a stratagem, the opponents of the carrier's application are free to demonstrate the inadequacy of the foreign licensing rules to protect the public interest.

¹¹ *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, IB Docket No. 97-142, Report and Order and Order on Reconsideration, FCC No. 97-398, at ¶ 338 (Nov. 26, 1997) ("Foreign Participation Order").

¹² *Id.*

¹³ Boeing Opposition at 4 n.8; Motorola Opposition at 5.

¹⁴ Loral Opposition at 2-5.

The first argument supports, rather than undermines, ICO's view that the Commission's classification of ICO as an IGO affiliate was premature and procedurally defective.¹⁵ If it is true, as Motorola contends, that "there is simply not an adequate record in this rulemaking proceeding for the Commission to make an adjudicatory finding that ICO is no longer an IGO affiliate,"¹⁶ then that record is equally inadequate to support a finding that ICO *is* an IGO affiliate.¹⁷ In fact, the Commission's decision, which is based on a definition of "IGO affiliate" that was not included in the Notice of Proposed Rulemaking, is vitiated both by lack of notice¹⁸ and lack of a record sufficient to support the Commission's action. Accordingly, even if the Commission is not prepared to declare at this time that ICO is not an IGO affiliate, the Commission at least should withdraw its conclusion that ICO is affiliated with Inmarsat and defer a decision on this issue until a proper record has been made.

ICO also disagrees with Loral's suggestion that the Commission is required by the Communications Act to base its affiliation determination on ownership interests.¹⁹ The Communications Act defines "affiliate" only as that term is used in the Act, and does not limit the Commission's ability to define that term in its rules according to the policies those rules are intended to serve. In this proceeding, in which the Commission's

¹⁵ ICO Petition at 6.

¹⁶ Motorola Opposition at 5.

¹⁷ In fact, the record in this proceeding plainly establishes ICO's independence from Inmarsat. ICO Petition at 6-7. If the Commission adopted a definition of affiliation based on the ability of an IGO to control another entity, rather than bare ownership interests, then a decision not to classify ICO as an IGO affiliate would be fully supported by the record already made.

¹⁸ See 5 U.S.C. §553; *National Black Media Coalition v. FCC*, 791 F.2d 1016, 1022-23 (2d Cir. 1986).

¹⁹ Loral Opposition at 3-4.

expressed concern regarding affiliation is an affiliated entity's ability to enjoy the immunities or other competitive advantages of an IGO, the Commission should define affiliation to include only those entities that have not achieved managerial and operational independence from an IGO predecessor. As ICO pointed out in its comments and in its petition for reconsideration, ICO has achieved such independence and should not be subject to heightened scrutiny as an IGO affiliate.

III. THE COMMISSION SHOULD CLARIFY ITS "VERY HIGH RISK TO COMPETITION" STANDARD

Boeing and Motorola both argue that the Commission's "very high risk to competition" test need not be confined to competitive conduct that would violate the U.S. antitrust laws and harm U.S. consumers. The Boeing and Motorola comments, which endorse an open-ended inquiry into competitive disputes that may have nothing to do with harm to consumers or the competitive process, underscore the need for clarification of the Commission's proposed standard. The Commission should confirm that it will not limit entry into the U.S. market for competitive reasons except through application of the same antitrust principles that apply to U.S. operators. Denial of applications on other competitive grounds will violate the market access commitments of the United States in the Basic Telecom Agreement.

IV. THE COMMISSION SHOULD CLARIFY ITS PROPOSED REQUIREMENTS FOR FREQUENCY COORDINATION OF NON-U.S. LICENSED SATELLITE SYSTEMS

ICO's Petition also asked the Commission to clarify the frequency coordination requirements it will impose on non-U.S. licensed satellite systems.²⁰ ICO has not requested, as Motorola contends, that the Commission subordinate its domestic frequency

²⁰ ICO Petition at 5-6.

coordination responsibilities to the international coordination process.²¹ ICO asks only that the Commission confirm that it will seek to avoid imposing duplicative frequency coordination requirements that are fully addressed by International Telecommunication Union (“ITU”) coordination provisions.²²

²¹ Motorola Opposition at 4.

²² The Commission also should require that U.S.-licensed satellite systems coordinate with non-U.S. licensed satellite systems in accordance with relevant ITU coordination provisions.

CONCLUSION

The WTO Basic Telecom Agreement mandates regulations that simplify, rather than complicate, the movement of capital and services across borders. This goal will not be advanced by redundant licensing and spectrum coordination requirements that invite proliferation of similar rules in other countries, heightened scrutiny of some applicants based upon arbitrary affiliation rules, and regulations that invite opponents of new entry to air competitive and trade disputes under the guise of protecting the competitive process. Favorable action on ICO's Petition for Clarification and Reconsideration will improve the promising framework the Commission has adopted for increased competition and consumer choice in the U.S. satellite market. ICO requests that its petition be granted.

Francis D.R. Coleman
ICO Global Communications
1101 Connecticut Avenue, N.W.
Suite 550
Washington, D.C. 20036
(202) 887-8111

Respectfully submitted,

By: 

Cheryl A. Tritt
Charles H. Kennedy
Morrison & Foerster LLP
2000 Pennsylvania Avenue, N.W.
Washington, D.C. 20006-1888
(202) 887-1500

Attorneys for
ICO Global Communications

Dated: February 27, 1998

CERTIFICATE OF SERVICE

I, Kathryn M. Stasko, do hereby certify that the foregoing **REPLY IN SUPPORT OF PETITION FOR CLARIFICATION AND RECONSIDERATION** was delivered, via first class mail, postage prepaid, on this 27th day of February, 1998, to the following:

Magalie Roman Salas* Secretary Federal Communications Commission 1919 M Street, N.W., Room 222 Washington, D.C. 20554	Chairman William E. Kennard* Federal Communications Commission 1919 M Street, N.W., Room 814 Washington, D.C. 20554
Commissioner Susan Ness* Federal Communications Commission 1919 M Street, N.W., Room 832 Washington, D.C. 20554	Commissioner Michael K. Powell* Federal Communications Commission 1919 M Street, N.W., Room 844 Washington, D.C. 20554
Commissioner Harold Furchtgott-Roth* Federal Communications Commission 1919 M Street, N.W., Room 802 Washington, D.C. 20554	Commissioner Gloria Tristani* Federal Communications Commission 1919 M Street, N.W., Room 826 Washington, D.C. 20554
Christopher J. Wright* General Counsel Federal Communications Commission 1919 M Street, N.W., Room 614 Washington, D.C. 20554	Robert M. Pepper* Chief Office of Plans and Policy Federal Communications Commission 1919 M Street, N.W., Room 822 Washington, D.C. 20554
Regina M. Keeney* Chief International Bureau Federal Communications Commission 2000 M Street, N.W., Room 800 Washington, D.C. 20554	James L. Ball* Assistant Bureau Chief International Bureau Federal Communications Commission 2000 M Street, N.W., Room 800 Washington, D.C. 20554
Thomas Tycz* Chief Satellite & Radiocommunications Division International Bureau Federal Communications Commission 2000 M Street, N.W., Room 800 Washington, D.C. 20554	Cecily C. Holiday* Deputy Chief Satellite & Radiocommunications Division International Bureau Federal Communications Commission 2000 M Street, N.W., Room 800 Washington, D.C. 20554

<p>Diane Cornell*</p> <p>Chief</p> <p>Telecommunications Division</p> <p>International Bureau</p> <p>Federal Communications Commission</p> <p>2000 M Street, N.W., Room 800</p> <p>Washington, D.C. 20554</p>	<p>Kathleen Campbell*</p> <p>International Bureau</p> <p>Federal Communications Commission</p> <p>2000 M Street, N.W., Room 800</p> <p>Washington, D.C. 20554</p>
<p>Virginia Marshall*</p> <p>International Bureau</p> <p>Federal Communications Commission</p> <p>2000 M Street, N.W., Room 800</p> <p>Washington, D.C. 20554</p>	<p>Daniel Phythyon*</p> <p>Chief</p> <p>Wireless Telecommunications Bureau</p> <p>Federal Communications Commission</p> <p>2025 M Street, N.W., Room 5002</p> <p>Washington, D.C. 20554</p>
<p>Charlene Vanlier</p> <p>ABC, Inc.</p> <p>21 Dupont Circle</p> <p>Sixth Floor</p> <p>Washington, D.C. 20036</p>	<p>Randolph J. May</p> <p>Sutherland, Asbill & Brennan LLP</p> <p>1275 Pennsylvania Ave., N.W.</p> <p>Washington, D.C. 20004-2404</p>
<p>Philip V. Otero</p> <p>Senior Vice President & General Counsel</p> <p>GE American Communications, Inc.</p> <p>Four Research Way</p> <p>Princeton, NJ 08540</p>	<p>Peter Rohrbach</p> <p>Karis A. Hastings</p> <p>Hogan & Hartson LLP</p> <p>555 Thirteenth Street, N.W.</p> <p>Washington, D.C. 20004</p>
<p>Alfred M. Mamlet</p> <p>Maury D. Shenk</p> <p>Steptoe & Johnson LLP</p> <p>1330 Connecticut Ave., N.W.</p> <p>Washington, D.C. 20036</p>	<p>Joseph A. Godles</p> <p>W. Kenneth Ferree</p> <p>Goldberg, Godles, Wiener & Wright</p> <p>1229 Nineteenth Street, N.W.</p> <p>Washington, D.C. 20036</p>
<p>Keith H. Fagan</p> <p>Neal T. Kilminster</p> <p>Bruce A. Henoch</p> <p>COMSAT Corporation</p> <p>6560 Rock Spring Drive</p> <p>Bethesda, MD 20817</p>	<p>Phillip L. Spector</p> <p>Jeffrey H. Olson</p> <p>David J. Weiler</p> <p>Paul, Weiss, Rifkind, Wharton & Garrison</p> <p>1615 L Street, N.W.</p> <p>Suite 1300</p> <p>Washington, D.C. 20036</p>

<p>Stephen R. Bell Andrew R. D'Uva Willkie Farr & Gallagher Three Lafayette Centre 1155 21st Street, N.W. Washington, D.C. 20036-3384</p>	<p>Peter D. Sloane Office of the Group Counsel Information, Space & Defense Systems Group The Boeing Company P.O. Box 3999, M/S 84-10 Seattle, WA 98124-2499</p>
<p>Joseph P. Markoski Herbert E. Marks David A. Nall Bruce A. Olcott Squire, Sanders & Dempsey L.L.P. 1201 Pennsylvania Ave., N.W. P.O. Box 407 Washington, D.C. 20044-0407</p>	

* By Hand Delivery

Kathryn M. Stasko
Kathryn M. Stasko